IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 453 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ANIRUDDHSINH MAHIPATSINH JADEJA

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 453 of 2001

MR TUSHAR MEHTA for Petitioner No. 1

MR AD OZA PUBLIC PROSECUTOR for Respondent No. 1

and Respondent No. 2-3 with Mr.HL JANI APP

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 14/08/2001

ORAL JUDGEMENT

Heard Mr.Tushar Mehta, learned advocate appearing on behalf of the petitioner and Mr.A.D.Oza, learned Public Prosecutor with Mr.H.L.Jani, learned APP on behalf of the respondents. RULE. Mr.A.D.Oza, learned PP waives service of rule on behalf of the respondents.

#. Before passing the order in the present matter, it is necessary to note the relevant observations made by the Apex Court in case of SUNIL BATRA V. DELHI

ADMINISTRATION reported in AIR 1980 Supreme Court 1579, the relevant observations are quoted as under :-

[D] Constitution of India, Article 19, 32, 226 - Prison excesses - Rights of Prisoner and Duties of the Court.

Where the rights of a prisoner either under the Constitution or under other law, are violated the writ power of the court can and should run to his rescue. There is a warrant for this vigil. The Court process casts the convict into the prison system and the deprivation of his freedom is not a blind penitentiary affliction but a belighted institutionalisation geared to a social good. The Court has a continuing responsibility to ensure that constitutional purpose of the deprivation is not defeated by the prison administrative. AIR 1978 1675, Reiterated. [Para 30]

Whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods `right, just and fair' AIR 1978 SC 597, Ref [Para 30]

A prisoner wears the armour of basic freedom even behind bars and that on breach thereof by lawless officials the law will respond to his distress signals through `writ' aid. The Indian human has a constant companion - the Court armed with the Constitution. The weapon is `babeas', the power is Part III and the projectile is Batra [AIR 1978 SC 1675]. It is therefore, the court's concern, implicit in the power to deprive the sentence of his personal liberty, to ensure that no more and no less than is warranted by the sentence happens. If the prisoner breaks down because of mental torture, psychic pressure or physical infliction beyond the licit limits of lawful imprisonment the Prison Administration shall be liable for the excess. On the contrary, if an influential convict is able to buy advantages and liberties to avoid or water down the deprivation implied in the sentence the Prison Establishment will be called to order for such adulteration or dilution of court sentences by executive palliation, if unwarranted by law."

`Prisons are built with stones of law' and so it behoves the court to insist that, in the eye of

law, prisoners are persons, not animals, and punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials 'dressed ill a little, brief authority', when Part III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock. And when the Court takes cognizance of such violence and violation, it does, like the. Hound of Heaven, 'But with unhurrying chase, And unperturbed pace, Deliberate speed, and Majestic instancy' follow the official offender and frown down the outlaw adventure.

#. The brief facts giving rise to the present petition are as under :-

The petitioner - Aniruddhsinh M. Jadeja is charged with an offence interalia under Section 302 of IPC and the provisions of TADA Act. The petitioner was convicted and sentenced to suffer RI for life by the Hon'ble Apex Court under Section 302 of IPC and the provisions of the TADA Act by the order dated 10th July, 1997. Initially, according to the petitioner, he was apprehending that he will be killed in an encounter and therefore was fearing surrendering before the police authorities. Thereafter, the petitioner surrendered to the custody of the learned Sessions Judge, Rajkot by filing a pursish to that effect and the Sessions Judge was pleased to take the petitioner in the judicial custody and was subsequently handed over to the police custody. The Special Inspector General of Police, Rajkot range also assured in writing about the safety of the petitioner. The petitioner applied for his parole leave to the Inspector General of Police [Prinsons] on 19th May, 2000. However, no reply was received by the petitioner. The petitioner had to apply for the same as the petitioner's real brother Ramdevsinh Mahipatsinh Jadeja passed away in an accident on 18th May, 2001. Therefore, according to the petitioner, presence of the petitioner was necessary at the time of death ceremony and other rituals of his brother. However, as no reply was filed, the petitioner was constrained to file Special Criminal Application No.362/ 2001 before this Court but as the petition was filed at a stage when the petitioner's application was still pending, the petitioner withdrew the said petition but this Court has specifically granted liberty to file a petition after the State Government decides the application preferred by the

petitioner. It is case of the petitioner that though substantial period has passed, the respondents have neglected to decide the said application and each day which the petitioner passes in the jail is unbearable without meeting the family members as the petitioner would like to be with his family members when such unfortunate incident has taken place. The petitioner is passing through a mental trauma as his real elder brother has passed away. It is also case of the petitioner that the wife of the brother of the petitioner is also suffering from ill health which also requires the presence of the petitioner and solace and therefore an application dated 9th May, 2001 was also made on behalf of the petitioner prior to the application dated 19th May, 2001. In light of this fact, according to the petitioner, on account of the negligence in deciding the application of the petitioner, the petitioner is constrained to move this petition before this Court invoking extra ordinary constitutional jurisdiction of this Court even while the application / representation of the petitioner is pending with the respondents which in fact has remained undecided for no fault on the part of the petitioner. On the record of this petition, the petitioner has also produced death certificate of elder brother of the petitioner and also the certificate of cause of death of the elder brother given by the medical officer of General Hospital, Rajkot. The respondents have filed affidavit in reply through one Ms.R.B.Bara, Deputy Secretary, Home Department, Sachivalaya Gandhinagar dated 4th July, 2001 along with Annexure-1 which is letter dated 20th October, 2000 written by the Police Commissioner, Rajkot addressed to the Additional Chief Secretary, Home Department. A newspaper cutting is also placed on record along with Annexure-2 which is the order passed by the State Government on 25th October, 2000 under Section 268 [1] of the CrPC, which is also produced on record. A letter dated 20th May, 2001 received from the Superintendent of Police, Rajkot Rural addressed to the Additional Chief Secretary of Home Department is also placed on record so also the letter of the Police Sub Inspector, Taluka Police Station Gondal dated 20th May, 2001 addressed to the DSP, Rajkot Rural is also placed on record along with the statement of one Balvirsinh Dilipsinh Gohel dated 19th May, 2001 who happens to be a brother in law of the petitioner is also placed on record. The jail report is also placed on record and copy of the earlier order dated 28th May, 2001 passed by this Court [Coram : R.R.Tripathi, J.] in Special Criminal Application No.362 / 2001 is also placed on record. The copy of the order dated 26th June, 2001 rejecting the parole application of the petitioner is

also placed on record along with newspaper cutting. Again jail report dated 27th June, 2001 is also placed on record by the respondents.

#. In the present petition, this Court has passed order on 22nd June, 2001 with a direction to the respondent No.1 - State Government to consider and decide the application submitted by the petitioner before 19th May, 2001 in accordance with law on or before 27th June, 2001 and place copy of the said order that may be passed on the said application on the record of this petition on the returnable date. Pursuant to the order passed by this Court, the State Government has placed on record the order dated 26th June, 2001, wherein the application of the parole submitted by the brother of the petitioner has been rejected, is placed on record, wherein it is mentioned that the State Government has rejected the parole application in the public interest by order dated 29th May, 2001. The petitioner subsequently has placed on record the draft amendment which was granted by this Court and accordingly the petition has been amended by the petitioner. In light of this fact, the petitioner now challenges the order of rejection of the parole application submitted by the brother of the petitioner dated 29th May, 2001 which has been communicated to the petitioner through the Court on 26th June, 2001. Therefore, in the present petition, this Court is now required to examine the legality and validity of the order of rejecting parole application submitted by the brother of the petitioner on 29th May, 2001 through communication dated 26th June, 2001.

#. I have heard learned advocates Mr.Tushar Mehta for the petitioner and Mr.A.D.Oza, learned Public Prosecutor with Mr.H.L.Jani, learned APP on behalf of the respondents. Mr.Tushar Mehta has submitted that the order under Section 268 [1] has been passed by the State Government on 25th October, 2000 which is challenged by the petitioner in Special Criminal Application No.503 / 2001. Mr.Mehta has further submitted that the conditions incorporated under Section 268 [2] has not been satisfied and all the conditions are required to be satisfied prior to passing of the order under Section 268 [1] of the CrPC. Mr.Mehta has also submitted that condition [b] under Section 268 [2] of CrPC is missing and therefore, under the guise of the order passed by the State Government under Section 268 [1], parole application has been rejected, is illegal and contrary to the settled law. Mr.Mehta has also submitted that parole application

has been rejected wherein, the ground made out for rejection of such application is public interest and accordingly, said application has been rejected. What was the public interest has not been specifically mentioned by the State Government and therefore, the order is also bad in law. He also submitted that the relevant provisions of Section 268 [1] will not apply to the convict unless the petitioner is in custody in respect of criminal proceedings pending against the petitioner. Mr.Mehta has also pointed out that in all the pending criminal cases, wherein the petitioner has been enlarged on bail and therefore, there was no need to pass such order under Section 268 [1] of CrPC. Mr.Mehta has also pointed out that newspaper cutting has been relied on and letter or proposal dated 20th October, 2000 received from the Police Commissioner, Rajkot and a letter dated 24th October, 2000 written by the DSP, Rajkot Rural are taken into account while passing the order under Section 268 [1] but according to Mr.Mehta, considering these two letters, there was no compelling circumstances which justify the order under Section 268 [1] of the CrPC. He also submitted that mobile chapter, when the petitioner was produced before the CJM at Rajkot has been highlighted by the State Government for passing the orders under Section 268 [1] but no private complaint has been filed by any person alleging that any such threat has been given by the petitioner on mobile phone. Mr.Mehta has also submitted that said demise of the elder brother of the petitioner, requires immediate presence of the petitioner with his family members and some family matters are required to be discussed with the petitioner and therefore, parole application has been submitted which ultimately came to be rejected without application of mind and the order which has been passed by the State Government on 29th May, 2001 which has not been communicated to the petitioner till communication dated 26th June, 2001 for the first time produced by the respondents - State Government before the Court and on no such previous occasion, any such communication has been given to the petitioner for rejecting parole application submitted by the brother of the petitioner. Mr.Mehta has also relied upon relevant provisions of The Prison [Bombay Furlough and Parole] Rules, 1959 and he pointed out that as per Rule 18 [2], the petitioner is entitled to parole in case of death of his nearest relative, like father, mother, brother, sister, spouse or child of the petitioner. The cause behind such application is genuine and real and same has not been disputed by the respondents - State Government and therefore, learned advocate Mr.Mehta has submitted that in light of undisputed fact and considering the veracity of the

genuine cause, the application for parole ought to have been granted but rejecting the application is clear arbitrariness and non application of mind on the part of the respondent authorities. Mr.Mehta has also submitted that though time has been elapsed but fact remains that the elder brother of the petitioner has died on 18th May, 2001 and in no time, in other words, immediately on the next date on 19th May, 2001 the brother of the petitioner has submitted application to release the petitioner on parole which remained pending before the State Government upto 29th May, 2001 and no such decision has been communicated to the petitioner immediately and since the same is communicated on 26th June, 2001, that order is under challenge before this Court. Therefore, time consumed in the proceedings for arriving at decision by the State Government can be considered as delay not on the part of the petitioner but it is a failure on the part of the respondents and as such there is no fault on the part of the petitioner for preferring parole application on account of sad demise of the elder brother of the petitioner. Mr.Mehta has also pointed out that after tendering of the parole application by the brother of the petitioner, many political leaders representing the nearby locality adjoining districts in Saurashtra requested the State Government with their recommendations to grant parole in favour of the petitioner but despite this the State Government has not considered said request and recommendation is made by the eminent political leaders and ultimately rejected the parole application submitted by the brother of the petitioner. Mr.Mehta has also pointed out that the family of the petitioner is still passing through mental agony and trauma on account of sad demise of the brother of the petitioner and on such unfortunate occasion of sad demise in the family, presence of the petitioner is badly needed by the family members to share feelings of the family members on untimely sad demise of elder brother of the petitioner. It is also submitted that whatever time has been consumed in taking decision by the State Government and even the time consumed in deciding the matter before this Court, may not adversely affect the legal right of the petitioner to have parole for genuine cause on account of death of his elder brother of the petitioner. Therefore, he submitted that the order of rejecting the parole application is required to be quashed and set aside and considering all the facts and circumstances of the case, the petitioner may be granted parole for some days on any conditions as may be deemed fit by this Court. It is also submitted that the petitioner is prepared and willing to accept any condition as may be imposed by this Court for granting parole.

#. Mr.A.D.Oza, learned Public Prosecutor appearing on behalf of the respondents - State Government has first raised contention that the real time for the occasion is now over and by now sufficient time has passed and therefore there is no need for grant of parole in favour of the petitioner. He also pointed out that two letters from the concerned Police Authorities dated 20th October, 2000 and 24th October, 2000 are received by the concerned authorities, wherein reasonable apprehension has been pointed out to the effect that in case of grant of parole in favour of the petitioner and once the petitioner is taken out of the custody of the concerned jail authority, then the convict may run away. It is also apprehended that after conviction by the Apex Court, the petitioner was absconding for nearly three years and ultimately, pursuant to the order passed by the Apex Court, the petitioner has surrendered before the District Judge, Rajkot and therefore, Mr.Oza, learned PP has pointed out that looking to the nature of offence committed by the petitioner and looking to history of absconding period of three years even after conviction, the petitioner did not surrender before the concerned police authority so also the recent incident of administering threat on mobile phone when he was produced before the CJM, Rajkot and thus, all these aspects are required to be taken into consideration because on grant of parole in favour of the petitioner, there are all possibility and likelihood of disturbance of public order and public safety and security and hence, the present petition seeking parole cannot be granted by this Court and same should be rejected accordingly. It is also pointed out that the petitioner is very influential and high handed person and therefore, it is very much difficult to have control over the petitioner if he granted parole by the State Government. He also pointed out that there is reasonable apprehension that in case if the petitioner is released on parole, even the life of the petitioner would be endanger and therefore considering the safety of the petitioner's life also, for which the father of the petitioner before the District Judge, Rajkot had also requested in writing, may also be taken into consideration, otherwise, if some untoward incident takes place, which can adversely affect the life of the petitioner. In short, on analysis of the vehement submission at length by Mr.Oza, learned PP, the prayer of granting parole application deserves to be rejected. Mr.Oza, learned PP in support of his submissions has also relied upon affidavit filed by one Ms.R.B.Bara, Deputy Secretary, Home Department, Sachivalaya, Gandhinagar, wherein also emphasis is made on para-3 of the reply to

the effect that history of the petitioner are that the petitioner is convicted for the offences punishable under Section 302 read with section 114 of IPC and under Section 3[2] of the TADA and under Section 25 [1][c] of the Arms Act in Sessions Case No.23/89. After the trial the petitioner is sentenced to suffer life imprisonment against which he had preferred SLP before the Hon'ble Apex Court confirmed the conviction on 10th July, 1997. The petitioner has surrendered before the District Judge, Rajkot on 28th April, 2000 that too after long period of about two years and since then the petitioner is in District Jail and thereafter he has been transferred to Central Jail, Sabarmati at Ahmedabad. In the reply, it is further pointed out that a report was received from the Commissioner of Police, Rajkot City vide his fax message dated 20th October, 2000 that the Commissioner of Police has received complaints from the people on phone that they are threatened by the petitioner and this report has been annexed to this reply as Annexure-1. It is also pointed out in the reply that in view of the reply and proposal dated 24th October, 2000 received from the Superintendent, Central Prison, Ahmedabad, the Government has issued order dated 25th October, 2000 to place the petitioner under Section 268 [1] of the CrPC and that order is annexed as Annexure-II to the affidavit in reply. It is also pointed out in the reply that application of the petitioner dated 19th May, 2001 for granting parole to attend funeral ceremony of the elder brother of the petitioner, was forwarded to the Jail Authority and the Head of the Department submitted a proposal to the concerned authority with regard to parole application dated 19th May, 2001 for appropriate decision to revoke temporarily the order of Section 268 [1] of CrPC. Pursuant to the said proposal, the Home Department of the State of Gujarat called for the opinion and police report of the Commissioner of Police, Rajkot City and District Superintendent of Police, Rajkot Rural vide fax message dated 19th May, 2001. Therefore, according to the deponent, considering the past criminal history of the petitioner, the Commissioner of Police Rajkot City reported and opined to release the petitioner with strict conditions at his costs. However, the DSP, Rajkot [Rural] has reported by fax message dated 20th May, 2001 that the petitioner should not be released on parole in view of the past criminal history and record of the petitioner and said letter has been placed on record as ANNEXURE-III along with reply. The proposal was again submitted to the State Government on 21-5-2001 along with the police report and past criminal history of the petitioner and after careful consideration the proposal in consultation with the high level officers of the

police and jail department, the Government decided on 29th May, 2001 not to revoke order passed under Section 268 [1] of the CrPC and release the petitioner on occasion of the death of his elder brother. It is also pointed out in the reply by the deponent to the effect that some leaders of political parties and social organisations have also represented to the Government for granting parole to the petitioner and therefore, before coming to the conclusion on the parole application, the Government has taken into consideration all the representations made by various political parties, persons and social organisations at the highest level and ultimately on 15th June, 2001 decided and upheld the earlier decision taken by the State Government. Therefore, rejection of the parole application of the petitioner was conveyed to the petitioner through jail vide Fax message dated 26th June, 2001 and thus, the delay caused in communicating the decision is attempted to justify in a manner that the representations made by the various organisations and political parties and persons were considered in the interest of justice by the authority before taking final decision and in such process, time is consumed on the part of the State Government. It is also admitted by the deponent that the brother of the petitioner had died in an unfortunate and tragic incident and looking to the past criminal history as referred to earlier in the reply and considering the fact that the petitioner was absconding for long period of two years, the Government has taken negative decision.

#. In light of reply of the respondent as discussed above, Mr.A.D.Oza, learned PP has submitted that this is the real cause and reason as to why the parole application has been rejected by the State Government and accordingly tried to justify the time consumed in passing the order and finally submitted that the order passed by the State Government rejecting parole application is legal and valid and therefore the same does not require any interference by this Court. Mr.Oza, learned PP has also pointed out that while passing the order under Section 268 [1], the State Government has taken into account the nature of offence for which the grounds on which person has been ordered to be confined or detained in prison and the public interest usually and therefore when number of criminal prosecutions are pending against the present petitioner though the petitioner has been enlarged on bail in each prosecution but it may require his presence by at any time provided the concerned Court may pas the order to produce the petitioner and therefore, in safer side and looking to the past criminal history and nature of the offence, the State Government

has passed the order under Section 268[2] of CrPC while considering the effect under Section 267 of CrPC. Therefore, learned PP Mr.Oza has again submitted that the present petition wherein the order of rejecting of parole application has been challenged, is required to be dismissed. Mr.Oza, learned PP has also placed on record the copy of the letter dated 24th October, 2000 addressed to the Deputy Secretary, Home Department written by the concerned jail authority.

#. I have considered the submissions of both learned advocates at length. Considering the facts and circumstances of the case so also the respective submission of the learned advocates, the provisions of relevant rules in respect of grant of parole as prescribed under Section 18 [1] [2] and 19 of The Prison [Bombay Furlough and Parole] Rules, 1959 are required to be referred and therefore the same are reproduced hereinbelow :

RULE 18 [1] [2] AND 19 of The Prison [Bombay Furlough and Parole] Rules, 1959.

"18. Authorities competent to sanction parole-

[1] The authority competent to sanction release of a convicted prisoner on parole [herein -after referred to as "the Competent Authority'] shall be as follows' namely :-

[i] the State Government in the following cases :-

(a) Prisoners convicted by Courts situated outside the State of Maharashtra;

(b) prisoners convicted by courts situated within the State of Maharashtra, but confined in Prisons situated outside the State;

(c) Prisoners convicted of political offences;

(d) any other case or class of cases wherein the State Government has directed that the case of the specified class of cases should be referred to it for orders; and

(ii) The Commissioner of the Division, in all other cases in a Division, in which the convicted prisoner is confined, or when the Divisional

Commissioner is out of headquarters, the Additional Divisional Commissioner;

Provided that if an application for release on parole or for an extension of the period of parole is refused by the Divisional Commissioner or the Additional Divisional Commissioner, as the case may be, an appeal shall lie to the State Government, whose decision thereon shall be final.]

[2] Notwithstanding anything contained in sub-rule (1), the Superintendent of Prison shall also be the Competent Authority to release a convicted prisoner on parole for a period not exceeding fifteen days, in case of death of his close relation i.e. father, mother, brother, sister, spouse or child of the prisoner.]

19. When a prisoner may be released on parole:-

A prisoner may be released on parole for such period not exceeding thirty days at a time, as the Competent authority referred to in Rule 18, in its discretion may order, in cases of serious illness, or death of nearest relative such as mother, father, sister, brother, children, spouse of the prisoner, or in case of natural calamity such as house collapse, floods, fire. No such parole or extension of parole shall be granted without obtaining a police report in all cases except in the case of death of his nearest relatives mentioned above :

Provided that a prisoner shall not be released on parole for one year after expiry of his last parole except in case of death of his nearest relatives mentioned above.]

#. While reading Rule 18 and 19, it is clear from Rules itself that prisoner may be released on parole for such period not exceeding 30 days at a time as Competent Authority referred to Rule 18 in its discretion may order in cases of serious illness or death of nearest relative such as mother, father, sister, brother, children, spouse of the petitioner or in case of natural calamity as such house collapse, flood, fire. No such parole or extension of parole shall be granted without obtaining a police report in all cases except in the case of death of his nearest relatives mentioned above provided that a

prisoner shall not be released on parole for one year after expiry of his last parole except in case of death of his nearest relatives mentioned above. While reading this Rule 19, it is pertinent to note that specific provision has been made by the legislature that no such prole or extension of parole shall be granted without obtaining a police report in all cases except in the case of death of his nearest relatives mentioned in the Rule. So in case of death of nearest relative, police report is not necessary for deciding the parole application submitted by the concerned convict before the State Government.

#. Considering the facts and circumstances of this case, I am also of the view that the judgment of the division bench of this Court in case of ISHWARSINH M. RAJPUT VS. STATE reported in 1990 GLR [2] p.1365. No doubt this case is in respect of provisions of NDPS Act and the relevant Section 32 A has been considered along with The Prison [The Bombay Furlough and Parole] Rules, 1959 with Bombay Jail Manual Rules. This authority is being discussed by this Court because there is observations made by the Division Bench of this Court in 14 GLR 104 in case of JUVANSINGH LAKHUBHAI JADEJA VS. STATE OF GUJARAT, wherein this Court has held that classification between prisoners on the basis of offences committed by them is reasonable and it is made with an object of safeguarding legitimate rights of the citizens in regard to their security in the matter or life and liberty. The Court has specifically observed that while meeting out humane treatment to the convicts, care is required to be taken to ensure that kindness to the convicts, care is required to be taken to ensure that kindness to the convicts does not result in cruelty to the society. Consideration of sympathy cannot be permitted to overshadow the consideration regarding security of the society. The Court has also negatived the contention that in the case of more serious crime, like murder, prisoner is released, and offenders of robbary and docoity are not released on furlough and, therefore, it is violative of Article 14 of the Constitution. It would be worthwhile to quote the relevant discussion, which is as under :-

> ".... 9. Section 392, to 402 occur in Chapter XVII of the Indian Penal Code and relate to offences of robbery and dacoity. The question is : is there any rational basis for selecting this class of offences for being included in the list of the offences for which convicts should not be enlarged on furlough ? Now, in robbery an

element of violence is present along with theft or extortion. Violence is either actually used or attempted to be used either for carrying away of the property or for making the victim part with the property. And when five or more persons conjointly commit or attempt to commit robbery, the offence falls within the description of decoity. It is obvious that in dacoity five or more persons come together with the avowed object of obtaining property unlawfully by resort to violent means. When so many persons enter upon a life of crime and form a group which is likely to become an organized gang. It is clear that there is great danger in letting them loose. In order to maintain themselves they take to robbery in an organized fashion and it tends to become a habit or a way of life from which it is difficult to make a break. If one who has been found guilty of such an offence is released on furlough, there is no guarantee that he will not indulge in similar activity as soon as he is let large. None of the twin objects of punishment of imprisonment would them be served. Neither would he be reformed nor would the society remain immunized from his criminal activity for the specified period. It would be dangerous to the society to release him on furlough merely out of considerations of penal reform and humane treatment. As observed earlier, consideration of sympathy for him cannot be permitted to over-shadow the consideration regarding security of the society. Similarly with regard to the lesser offence of robbery, it would be extremely hazardous to let the prisoner loose before the expiry of the term of imprisonment. It would be hazardous to do so because when one abandons honest labour for the career of theft or intimidations coupled with violence [which brings easy money though at some risk] it tends to become a way of lift and the temptation is too great to resist when the prisoner is at large. The offences of robbery and dacoity, therefore, fall within a class by themselves. The classification is based on the danger inherent in releasing on furlough those who are proved to have unhesistatingly committed crimes against person as well as property and such crimes by their very nature are habit forming and repetitive. It is, therefore, not possible to say that the classification is irrelevant or that it has no nexus with the objective sought to be

achieved. It will be recalled that the object is two-fold (1) to enable the convict to break the reckless of his habit and [2] to immunize the society at least for a specified period. It was, however, argued by counsel that if a more serious crime like murder was not included int helist, there was no rational basis for including the offences relating to robbery and dacoity within the fold. Here again, the argument ignores the fact that by and large an offence of murder is committed by a person under some real or imagined provocation or in a moment of passion and the perpetrator of the crime usually has a motive or animus against a particular individual or individuals and not against the society at large. There is, therefore, less danger of his committing a similar crime when he is on leave on furlough. Robbery and dacoity are offences which are directed against the entire society at large and the entire society is exposed to the danger emanating from them. In case of murder only that person against whom the perpetrator has a motive or animus alone is exposed to danger from him and not others. So far as robbery and dacoity are concerned, any victim is a good victim and the entire society is exposed to the risk. It is, therefore, clear that the offences of robbery and dacoity fall in a different category. Whether or not the offence is more serious is not the relevant consideration for withholding furlough. The relevant consideration is whether his release will hamper his reform or expose the society to the very danger to shield from which the criminal is imprisoned. Therefore, the fact that murder may be by and large considered to be a more serious crime is not a circumstance which in any way impairs the reasoning underlying the selection of the offences falling under the specified class viz. the offences relating to robbery and dacoity. Again, the mere fact that some other offences also deserve to be included in the list of offences in respect of which furlough should not be granted [even if the argument is valid] is not a good ground for not including the offences or robbery and dacoity. By experimentation, and by gaining experience the list may be enlarged or modified from time to time. A classification which is otherwise rational and purposeful and bears a nexus with the underlying object of the legislation cannot be branded as obnoxious merely because another

class also ought to be brought within the sweep of the legislation. It is not true that to say that all evils must be remedied by the same legislation in order to be immune from the charge of discrimination. It is not a valid argument that the legislature can legislate in respect of all evils or none. Legislation can be implemented by stages. The mere circumstance, that other class of offences may also be included within the list will not render the class which is actually included devoid of rational basis. Under the circumstance, it is not possible to uphold the contention that Rule 4[2] is discriminatory in character and is violative of Article 14 of the Constitution of India. We are of the opinion that the classification has a rational basis and has a distinct nexus with the underlying object of the legislation and that it does not introduce any element of hostile discrimination."

##. It is necessary to refer the Full Bench decision of this Court in case of BHIKHABHAI VS. STATE reported in 1987 [2] GLR 1178 and the relevant observations in para-12, 13 and 14 are quoted as under :-

"12. In view of the this guiding and binding principle of interpretation, let us have a look at the purposes of the present legislation and furlough system.

13. The Parole and Furlough Rules are part of the penal and prison reform with a view to humanise the prison system. These rules enable the prisoner to obtain his release and to return to the outside world for a short prescribed period. The objects of such a release of prisoner can be read from para 101 of the report submitted by the All India Jail Manual Committee as also the objects mentioned in the Model Prison Manual. These objects are :

(i) to enable the inmate to maintain continuity with his family life and deal with family matters.

(ii) to save the inmate from the evil effects of continuous prison life.

(iii) to enable the inmate to maintain constructive hope and active interests in life."

14. In the Statement of Objects and Reasons for Bombay [Prisons Amendment] Act No.27 of 1953, the Jail Reforms Committee had recommended and the Government accepted the recommendation that:

"There should be the system of release of prisoners on furlough under which well behaved prisoners of certain categories should, as a matter of right have a spell of freedom occasionally after they undergo a specified period of imprisonment, so that they may maintain contact with their near relatives and friends and may not feel uprooted from society. Government accepted these recommendations and also decided that the furlough period should count towards the prisoner's sentence.

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The experience has shown that the system has worked satisfactorily. The Prisons Act, 1894 does not specifically provide for the grant of furlough and the remission of sentence consequent upon it. In order to place the system on a permanent footing and to enable the Government to delegate its powers to the Inspector General of Prisons, it is necessary that the Prisons Act, 1894 should be amended in its application to the State of Bombay."

##. There is also Division Bench decision in case of BATUKBHAI RAMJIBHAI V. STATE OF GUJARAT reported in 1991 [1] GLH 98, wherein the division bench after considering the full bench decision reported in 1987 [1] GLH 139, reiterated the observations in para-5 and 6, which are reproduced as under ;

5. Further in the case of Narsing N. Gamit v. State of Gujarat and others, reported in 29[2] GLR 1268, this Court has observed as under :-

"3. At the out set it should be noted that I.G., Prisons, should not reject the petitioner's application for releasing him on furlough solely on the ground that there is adverse police opinion. The I.G. Prisons, before deciding the prisoner's application for releasing him on furlough, should take into consideration the

guidelines laid down under the relevant rules, i.e. the Prison [Bombay Furlough and Prole] Rules, 1959.

4. Firstly, if the prisoner is to be released on parole or furlough for the first time after his conviction, then I.G. Prisons should consider the facts and circumstances and allegations against the prisoner for which he is convicted. For this purpose he should refer to the judgment and order passed by the Court convicting him. From the judgement, he should try to find out whether the prisoner is hardened criminal, habitual offender or whether the offence took place all of a sudden or the offence took place because of some enmity or long standing dispute between the parties. From the aforesaid circumstances he can arrive at the conclusion that by releasing the prisoner on furlough whether the prisoner is likely to commit any offence when he is on furlough whether there is likelihood of breach of peace during that period.

5. Secondly, he should consider the criteria laid down under Rule 4 of the Furlough and Parole Rules, 1959 particularly whether the prisoner is a habitual offence, his conduct in the prison and whether he has shown any tendency towards crime in the person and whether at any time he has escaped or attempted to escape from lawful custody or has defaulted in any way in surrendering himself at the appropriate time after release on parole or furlough. Under Rule 8 sub rule (5) if furlough isn't recommended, the District Magistrate or the Commissioner of Police is required to mention adequate reasons therefor. Under sub rule (6) of Rule 8 the Sanctioning Authority is required to consider the said recommendation and pass an appropriate order. It does not mean that if the authority has not recommended it without any reason or for any insufficient reason, the Sanctioning Authority, i.e. the I.G. Prisons should not release the prisoner on furlough.

6. Thirdly, he should take into consideration whether the prisoner was previously released either on furlough or parole and at that time whether he committed any offence or whether any breach of peace took place."

In spite of these decisions and directions to the I.G.Prisons, the I.G., Prisons is rejecting furlough or parole applications in most of the cases mechanically by following police opinion. It seems that he does not consider the statutory rules which cast upon him a duty to decide the applications judicially. In most of the cases, some police constable visits the village where the prisoner intends to reside. He records statements of some of the relatives of the accused or victim and opines that there is likelihood of breach of peace if the prisoner is released. On the basis of these statements, opinion is forwarded by higher officer to the I.G., Prisons that there is likelihood of breach of peach if the prisoner is released. On the basis of this opinion i.G., Prisons rejects the applications without considering the fact that the prisoner was released previously on number of occasions and at that time no untoward incident had taken place. In our view, this approach of the I.G., Prisons is totally unjustified, unreasonable and amounting to not discharging his duties in accordance with the rules.

6. In this case the petitioner is convicted for the offence punishable under Section 302 of the Indian Penal Code for murdering his own sister as she was having ilicit relations with one Muslim boy. There is nothing to show that he is a habitual offender. In these set of circumstances by no stretch of inclination it can be said that the petitioner is a habitual offender or that if he is released on parole or furlough he is likely to commit any other offence. In any set of circumstance, it is the say of the petitioner that if he is released on furlough he would stay in Sabarkantha District only and would not go at Bhavnagar where the offence took place."

##. Recently in case of DADU V. STATE OF MAHARASTHRA reported in 2000 CLR L.J. 4619, the Apex Court has considered the question of granting parole to the convict under the provisions of NDPS Act. Relevant observations in para 7, 9 and 10 are referred as under :-

"7. Grant of parole is essentially an Executive function to be exercised within the

limits prescribed in that behalf. It would not be open to the Court to reduce the period of detention by admitting a detenu or convict on parole. Court cannot substitute the period of detention either by abridging or enlarging it. Dealing with the concept of parole and its effect on period of detention in a preventive detention matter, this Court in Poonam Lata Vs. m.L. Wadhawan [1987] 3 SCC 347 : [AIR 1987 SC 1383 : 1987 Cri.L.J. 1130] held [para 8 of the AIR, Cri.LJ.] :

"There is no denying of the fact that preventive detention is not punishment and the concept of serving out a sentence would not legitimately be within the purview of preventive detention. The grant of parole is essentially an executive function and instances of release of detenus on parole were literally unknown until this Court and some of the High Courts in India in recent years made orders of release on parole on humanitarian considerations. Historically `parole' is a concept known to military law and denotes release of a prisoner of war on promise to return. Parole has become an intergral part of the English and American systems of criminal justice intertwined with the evolution of changing attitudes of the society towards crime and criminals. As a consequence of the introduction of parole into the penal system, all fixed term sentences of imprisonment of above 18 months are subject to release on licence, that is, parole is taken as an act of grace and not as a matter of right and the convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement, but is deemed to be a part of the imprisonment. Release on parole is a wing of the reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty of lessening of restrictions to a convict prisoner, but release on parole does not change the status of the prisoner. Rules are framed providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody. [See The Oxford Companion to Law, edited by Walker 1980 Edn. p.931: Black's Law Dictionary, 5th Edn. p.1006,

Jowitt's Dictionary of English Law, 2nd Edn, Vol.2 p.1320 ; Kenny's OUtlines of Criminal Law, 17th Edn., pp.574-76; the English Sentencing System by Sir Rupert Cross at pp. 31-34; 87 et seq; American Jurisprudence, 2nd Edn. Vol.59 pp.52-61; Corpus Juris Secundum, Vol.67; Probation and Parole, Legal and Social Dimensions by Louis P. Carney). It follows from these authorities that parole is the release of avery long term prisoner from a penal or correctional institution after he has served a part of his sentence under the continues custody of the State and under conditions that permit his incarceration in the event of mishebaviour."

9. The Constitution Bench of this Court in Sunil Fulchand Shah v. Union of India [2000] 3 SCC 409 : (2000 AIR SCW 582 : AIR 2000 SC 1023 : 2000 Cri LJ 1444) considered the distinction between bail and parole in the context of reckoning the period which a detenu has to undergo in prison and held [paras 10 and 11 of AIR Cri LJ.] :

"Bail and parole have different connotations in law. Bail is well understood in criminal jurisprudence and Chapter XXXII of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the Court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word `bail' is surety. In Halsbury's Laws of England, 4th Edn. Vol 11 para-166, the following observation succinctly brings out the effect of bail :

The effect of granting bail is not to set the defendant [accused] at liberty but to release him from the custody of law and to entrust him to the custody of sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of

law and he will then be imprisoned.

`Prole', however, has a different connotation than bail even though the substantial legal effect of both bail and parole may be the release of a person from detention or custody. The dictionary meaning of "parole" is :

The Concise Oxford Dictionary - [New Edition]

"The release of a prisoner temporarily for a special purpose or completely before the expiry of a sentence, on the promise of good behaviour: such a promise; a word of honour."

Black's Law Dictionary - [6th Edition]

"Release from jail, prison or other confinement after actually serving part of sentence. Conditional release from imprisonment which entitles paroles to serve remainder of his term outside confides of an institution, if he satisfactorily complies with all terms and conditions provided in parole order."

According to the Law Lexicon, "Parole" has been defined as :

"A parole is a form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole."

According to Words and Phrases :

"Parole" ameliorates punishment by permitting convict to serve sentence outside of prison walls, but parole does not interrupt sentence. People ex rel Rainone Vs. Murphy [135 NE 2d 567, 571, 1 NY 2nd 367, 153 NTS 2d 21, 26].

`Parole' does not vacate sentence imposed, but is merely a conditional suspension of sentence. Wooden v. Goheen [Ky, 255 SW 2d 1000, 1002].

A `parole' is not a `suspension of sentence', but is a substitution, during continuance of parole, of lower grade of punishment by confinement in legal custody and under control of warden within

specified prison bounds outside the prison, for confinement within the prison adjudged by the Court. Jenkins v. Madigan [CA Ind. 211 F 2nd 904, 906].

A `parole' does not suspend or curtail the sentence originally imposed by the Court as contrasted with a `commutation of sentence' which actually modified it."

10. Again in State of Haryana v. Nauratta Singh [2000] 3 SCC 514 : [2000 AIR SCW 817 : AIR 2000 SC 1179 : 2000 Cri LJ 1710], it was held by this Court as under [para-14 of AIR, Cr.LJ.]:

"Parole relates to executive action taken after the door has been closed on a convict. During parole period there is no suspension of sentence but the sentence is actually continuing to run during that period also."

##. Mr.A.D.Oza, learned PP has relied upon the decision of the Apex Court in case of S.F.SHAH V. UNION OF INDIA reported in 2000[2] G.L.H. 212. However, Mr.Oza, learned PP has mainly relied on few lines of the Judgement. The relevant para-6 is reproduced as under :-

"6. Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanizing the harsh authority over individual liberty. Since, preventive detention is a form of precautionary state action, intended to prevent a person from indulging in a conduct, injurious to the society or the security of State or public order, it has been recognised as "a necessary evil" and is tolerated in a free society in the larger interest of security of State and maintenance of public order. However, the power being drastic, the restrictions placed on a person to preventively detain must, consistently with the effectiveness of detention, be minimal. In a democracy governed by the Rule of Law, the drastic power to detain a person without trial

for security of the State and / or maintenance of public order, must be strictly construed. This Court, as the guardian of the Constitution, though not the only guardian, has zealously attempted to preserve and protect the liberty of a citizen. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation."

However, HEAD NOTE `C' of the aforesaid judge reported in case of S.F.SHAH VS. UNION OF INDIA, which is quite relevant with the facts of the present case are reiterated as under :-

"Since, release on parole is only a temporary arrangement by which a detenu is release for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted towards total period of detention unless the rules, instructions or terms for grant of parole, prescribe otherwise. The period during which parole is availed of is not aimed to extend the outer limit of the maximum period of detention indicated in the order of detention. The period during which a detenu has been out of custody on temporary release on parole, unless otherwise prescribed by the order granting parole, or by rules or instructions, has to be included as a part of the total period of detention because of the very nature of parole. An order made under S.12 of temporary release of a detenu on parole does not bring the detention to an end for any period it does not interrupt the period of detention it only changes the mode of detention by restraining the movement of the detenu in accordance with the conditions prescribed in the order of parole. The detenu is not a free man while out on parole. Even while on parole he continues to serve the sentence or undergo the period of detention in a manner different than from being in custody. He is not a free person. Parole does not keep the period of detention in a state of suspended animation. The period of detention keeps ticking during this period of temporary release of a detenu also because a parole remains in legal custody of the State and under the control of its agents, subject at any

time, for breach of condition, to be returned to custody. Thus, cases which are covered by S.12 of COFEPOSA, the period of temporary release would be governed by the conditions of release whether contained in the order or rules or instructions and where the conditions do not prescribe it as a condition that the period during which the detenu is out of custody, should be excluded from the total period of detention, it should be counted towards the total period of detention for the simple reason that during the period of temporary release the detenu is deemed to be in constructive custody. In cases falling outside S.12 if the interruption of detention is by means not authorised by law, then the period during which the detenu has been at liberty, cannot be counted towards period of detention while computing the total period of detention and that period has to be excluded while computing the period of detention. The answer to the question, therefore, is that the period of detention would not stand automatically extended by any period of parole granted to the detenu unless the order of parole or rules or instructions specifically indicates as a term and condition of parole, to the contrary. The period during which the detenu is on parole, therefore, requires to be counted towards the total period of detention."

##. I have considered the submissions of both learned advocates as well as considered various authorities on which reliance placed by the respective learned advocate. Considering the submission of Mr.Oza, learned PP that after conviction by the Apex Court dated 10th July, 1997, the petitioner was absconding for about more than 2 years period so also drawn attention of this Court to past criminal history and the nature of the offence. It is also submission of the learned PP Mr.Oza that while in the jail custody, when the petitioner was produced before the CJM, Rajkot, he used mobile phone for administering threat to the public and therefore if he is released on parole, there are all likelihood of disturbance of public order and public peace. Therefore, the State Government has rightly rejected the application submitted by the petitioner. In light of this submission, Mr.Oza, learned PP, the aspect which arises for consideration of this Court is that whether the State Government is entitled to consider all these aspects while considering the parole application submitted by the petitioner or not ? No

doubt, Parole is not a legal right of the convict alike furlough but it is also right which has been guaranteed under the relevant Rules for which the petitioner is entitled in case of death of nearest relative. On an occasion of death of nearest relative of the convict and when an application for the parole is made before the State, it is the duty of the State to consider the relevant rules while dealing with the parole application of the convict. The State Government cannot discard the rules which are binding to the State Government at the time of passing the order on parole application. Therefore, it is necessary to note that Rule 19 of The Prison [Bombay Furlough and Parole] Rules 1959 which clearly provides that a prisoner may be released on parole for such period not exceeding thirty days at a time, as the Competent Authority referred to in Rule 18, in its discretion may order, in cases of serious illness, or death of nearest relative such as mother, father, sister, brother, children, spouse of the prisoner, or in case of natural calamity such as house collapse, floods, fire. No such parole or extension of parole shall be granted without obtaining a police report in all cases except in the case of death of his nearest relatives mentioned above. In the case on hands, the cause for seeking parole on the ground of death of elder brother of the petitioner and this cause not been disputed by the respondents - State Government. Therefore, it is undisputed position before this Court that nearest relative of the petitioner i.e. elder brother has died on 18th May, 2001 and therefore, parole application has been submitted on date 19th May, 2001, which has been rejected by the State Government on 29th May, 2001 and again after recommendations and representation from the political leaders, the State Government has again rejected on 15th June, 2001. Pursuant to the order passed by this Court on 22nd June, 2001, a communication dated 26th June, 2001 has been placed on record by the State Government and therefore, parole application has been rejected by the State Government as per the affidavit filed by the Deputy Secretary, Home Department dated 4th July, 2001 which is on record, wherein the averments of para-12 are as under :-

"12. With respect to the averments made in para : 4(b) to the petition, I say and submit that it is true that the petitioner's brother died in an unfortunate and tragic incident. I further say that as stated in foregoing paras looking to the past criminal history and record of the petitioner and particularly as he was absconding for a long period of two years, the

Government has taken a negative decision."

Therefore, rejection of parole application is mainly based on criminal history and record of absconding by the petitioner for a period of more than 2 years and therefore, while deciding the parole application, all these aspects as well as police report dated 20th October, 2000 and 24th October, 2001 are taken into consideration so also the order under Section 268 [1] of the CrPC dated 25th October, 2000. However, in my opinion, bare reading of Rule 19 of the Rules, in case of death of nearest relative of the convict, no police report / opinion is required. Therefore, past criminal history and record of earlier absconding period, letter dated 20th October, 2000 and 24th October, 2000 are not relevant consideration as per Rule 19 for rejection of the parole application. It is also necessary to note that death of elder brother of the petitioner on date 18th May, 2001 is not at all disputed by the respondents. No doubt some time has been taken by the State Government in taking decision and even while deciding the present petition, some time is also consumed by this Court but still mental agony on account of death of the nearest relative in the family of the petitioner is remained and it is the case of the petitioner that the family is passing through mental agony and trauma and therefore, the family members require presence of petitioner. It is also necessary to note that very object considered and discussed by the Full Bench of this Court in a decision referred to above in a case reported in 1987 [2] GLR 1178 that The Parole and Furlough Rules are part of the penal and prison reform with a view to humanize the prison system. These rules enable the prisoner to obtain his release and to return to the outside world for a short prescribed period. The objects of such a release of prisoner can be read from para 101 of the report submitted by the All India Jail Manual Committee as also the objects mentioned in the Model Prison Manual. These objects are :

(i) to enable the inmate to maintain continuity with his family life and deal with family matters.

(ii) to save the inmate from the evil effects of continuous prison life.

(iii) to enable the inmate to maintain constructive hope and active interests in life."

14. In the Statement of Objects and Reasons for Bombay [Prisons Amendment] Act No.27 of 1953, the Jail Reforms Committee had recommended and the Government accepted the recommendation that:

"There should be the system of release of prisoners on furlough under which well behaved prisoners of certain categories should, as a matter of right have a spell of freedom occasionally after they undergo a specified period of imprisonment, so that they may maintain contact with their near relatives and friends and may not feel uprooted from society. Government accepted these recommendations and also decided that the furlough period should count towards the prisoner's sentence.

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The experience has shown that the system has worked satisfactorily. The Prisons Act, 1894 does not specifically provide for the grant of furlough and the remission of sentence consequent upon it. In order to place the system on a permanent footing and to enable the Government to delegate its powers to the Inspector General of Prisons, it is necessary that the Prisons Act, 1894 should be amended in its application to the State of Bombay."

15. Thus, the Legislature has put the furlough system in the Act and it is made a matter of right.

16. In furtherance of these objects, the Parole and Furlough Rules are framed in exercise of powers under Section 59[5] and 28 of the Prisons Act, 1894.

##. Rule 19 of the Rules is very much clear which requires to grant parole application of the convict irrespective of the fact having adverse police report against the convict / prisoner.

##. It is necessary to note that State having serious apprehension that petitioner during parole may abscond or run away or disturb the public order and public peace. But State can take effective steps for such apprehension. The State can grant parole with full escort. If State is

not able to control one person even with escort then, how the State can protect the citizens under the public order and public peace. Such apprehension cannot become a ground to reject the parole application. Such inhuman approach of State is not just and proper. The convicts or prisoners are not animals who can be treated in such inhuman manner. It is undisputed that said incident occurred in the family, which requires presence of the petitioner just to share the said occasion with family members. It is also necessary to have some family arrangements or adjustments after the death of the elder brother of the petitioner. So merely some time lapse or the defence of the State that now the crucial time of occasion is over, is not enough to reject the application. Mental agony still remains in the mind of the family members on account of all of sudden death of the elder brother of the petitioner. Parole's Rule itself provide parole on such occasion even without police report. In such circumstances, rejecting parole application is little harsh and unjustified. In background of the said facts and circumstances of the present case, the relevant observations made by the Apex Court in case of SUNIL BATRA VS. DELHI ADMINISTRATION reported in AIR 1980 SC 1579 are quoted as under :-

"28. Are prisoners persons ? Yes, of course.
To answer in the negative is to convict the nation and the Constitution of dehumanization and to repudiate the world legal order, which now recognises rights of prisoners in the international Convenant on Prisoners' Rights to which our country has signed assent. .... "

55. Parole, again, is a subject which is as
yet unsatisfactory and arbitrary but we are not called upon to explore that constitutional area and defer it. Likewise, to fetter prisoners in irons is an inhumanity unjustified save where safe custody is otherwise impossible. The routine resort to handcuffs and irons bespeaks a barbarity hostile to our goal of human dignity and social justice. And yet this unconstitutionality is heartlessly popular in many penitentiaries so much so a penitent law must proscribe its use in any but the gravest situation.

61. The treatment of prisoners should
emphasize not their exclusion from the community, but their continuing part in it. Community

agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the minimum extent compatible with the law and the sentence the rights relating to civil interests, social security rights and other social benefits of prisoners.

83. ... `Reformation, not vindictive suffering, should be the purpose of the penal treatment of prisoners. The prisoner should be made to realize that his destiny is in his own hands :

Prison discipline should be such as to gain the will of the prisoner and conserve his self - respect;

The aim of the prison should be to make industrious free men rather than orderly and obedient prisoners.

54. Visits to prisoners by family and friends are a solace in insulation; and only a dehumanised system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow-men, parents and other family members cannot be denied in the light of Art.19 and its sweep. Moreover, the whole habilitative purpose of sentencing is to soften, not to harden, and this will be promoted by more such meetings. A sullen, forlorn prisoner is a dangerous criminal in the making and the prison is the factory | Sheldon Krantz rightly remarks : Sheldon Krantz, Corrections and Prisoners Rights pp. 129 - 130.

In 1973, the National Advisory Commission argued that prisoners should have a "right" to visitation. Task Force Report, Corrections [1973] at 66. It also argued that correctional officials should not merely tolerate visiting but should encourage it, particularly by families. Although the Commission recognised that regulations were necessary to contend with space

> problems and with security concerns, it proposed that priority be given to making visiting areas pleasant and unobstrusive. It also urged that corrections officials should not eavesdrop on conversations or otherwise interfere with the participants' privacy. Thus, although there may be current limitations on the possible use of the Constitution on visitations by family and friends, public policy should dictate substantial improvements in this area, in any event. We see no reason why the right to be visited under reasonable restrictions, should not claim current constitutional status. We hold, subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected."

##. It is also necessary to consider one another aspect that apprehension which has been pointed out by the State Government to the effect that if the parole application is granted in favour of the petitioner, it will adversely affect the life of the petitioner or can adversely affect the society and disturb the public order. However, at this juncture, it is necessary to note one important aspect which has been pointed out by the Deputy Secretary, Home Department in her affidavit in para-7 that in response to the application submitted by the petitioner on 19th May, 2001 to grant parole application, the Commissioner of Police, Rajkot City immediately reported and given opinion to release the petitioner with strict conditions at his cost. It is ambiguous for this Court as to why this opinion given by the competent police authority to the State Government, has not been taken into account. However, there is no specific and clear answer but an explanation submitted to the effect that DSP, Rajkot [Rural] whose report is otherwise and therefore, parole application has been rejected. However, this Court take this opportunity to mention that at the material time, had the State Government granted one day parole considering the opinion given by the Commissioner of Police, Rajkot City, then the agony and mental trauma of the family of the petitioner would have been satisfied to some extent and perhaps, the proceedings of this litigation could not have given rise. But it is the State Government, without taking into consideration the opinion of the Commissioner of Police, Rajkot City, has merely relied on the opinion of the DSP, Rajkot Rural, which in fact, otherwise to the opinion of the Commissioner of Police, Rajkot City but ultimately,

the application of the petitioner has been rejected. However, this Court observe that the provisions of Rule 19 of the Rules seems to be grossly ignored and neglected while dealing the application of the petitioner. However, it is also noted that the apprehension which has been pointed out by the State Government could have been taken care by putting the strict conditions against the petitioner while releasing the petitioner on parole as per the opinion of the Commissioner of Police, Rajkot City but merely having apprehension that the petitioner if released on parole, will adversely affect the public order and public peace in the society, is not the ground to reject the application of parole which made on account of genuine cause. In light of this special facts and circumstances of the case and considering Rule 19 of the Bombay Furlough and Parole Rules 1959 so also considering the cause that the elder brother of the petitioner has expired on 18th May, 2001, according to my opinion, the order passed by the State Government rejecting the parole application dated 29th May, 2001 which communicated by order dated 26th June, 2001 is required to be quashed and set aside.

##. In the result, the petition is allowed with direction to the State Government to grant parole in favour of the petitioner for a period of 5 [five] days on the following conditions :

[a] that the State Government will provide strict, complete and competent escort and the strength of the escort will be determined by the State Government considering the apprehension which has been pointed out by the State Government. However, it is directed to the State Government to provide appropriate disciplinary escort to the petitioner from the jail authority while transferring the petitioner from Sabarmati Central Jail to Rajkot District Jail.

[b] the petitioner is directed to deposit the sum of Rs.1,00,000/- [Rupees one lakh in cash] by himself or any of his relative before the concerned Sabarmati Central Jail Authority on or before the release of the petitioner on parole. It is further directed to the petitioner to deposit passport before the concerned jail authority, if possessed by him, prior to release of the petitioner on parole.

[c] the brother in law of the petitioner - Shri Balvirsingh Dilipsingh Gohel is directed to

deposit the sum of Rs.1,00,000/- [Rupees one lakh in cash] before the concerned Sabarmati Central Jail Authority on or before the release of the petitioner on parole and he is also required to file an undertaking, as a condition to this order, before this Court with assurance to this Court that during the five days parole, the petitioner will not indulge into any such activity which adversely affect the public order and public peace and the petitioner will not commit any offence during the parole period of five days and the petitioner will definitely surrender to the concerned jail authority along with escort on completion of five days and in case of any condition of the undertaking so also this order, the brother-in-law of the petitioner Dalbirsingh Dilipsingh Gohel will be liable to face contempt proceedings for committing breach in any manner by the petitioner. Such undertaking to the aforesaid effect is required to be filed before this Court on or before 17th August, 2001 and a copy thereof is directed to be served to the State of Gujarat through the office of the learned Public Prosecutor.

[d] on compliance of the aforesaid conditions, the State Government is directed to transfer the petitioner from Sabarmati Central Jail to Rajkot District Jail under full escort, at the cost of petitioner, as may be deemed fit by the State of Gujarat considering all the aspects of the apprehension expressed by State.

[e] during the 5 days period of parole as granted by this Court in the present order, it is directed to the State and the concerned jail authority to take the petitioner from Rajkot District Jail at 7.00 a.m. in the morning to the village of the petitioner at Ribda with full escort as may be determined and posted by the State and each day during the evening, the petitioner shall be brought back to the Rajkot District Jail on or before 5.30 p.m. with full escort who may be accompanying the petitioner in the morning hours. It is made clear that for all five days parole, the petitioner will be taken from Rajkot District Jail to his village - Ribda in the morning and brought back in the evening as directed hereinabove.

[f] parole period will commence from the day on which

the petitioner is taken from Rajkot District Jail to his village Ribada and shall accordingly end on completion of five days. That on completion of the parole as specified hereinabove, the State Government is directed to bring back the petitioner to the Sabarmati Central Jail without fail.

[e] It is also made clear that the cost of the escort will have to be borne by the petitioner and same shall be adjusted against the deposit as directed by this Court hereinabove. The amount that may be deposited by the brother-in-law of the petitioner-Shri Dalbirsingh Dilipsingh Gohel and the petitioner, as directed by this court, after adjusting the cost of the escort from the deposit of the petitioner, shall be returned to the respective depositor on satisfactory compliance of the order of this Court and the undertaking as directed to be filed by this Court by Shri Dalbirsingh Dilipsingh Gohel.

[f] However, in case of any default or breach of any of the conditions set out in this Order and undertaken by the brother in law of the petitioner - Dalbirsingh Dilipsingh Gohel, the amount of deposits made by the petitioner and his brother in law shall be liable to be forfeited by the State Government.

It it further made clear that after completion of all these formalities of filing undertaking by the brother in law of the petitioner - Dalbirsingh Dilipsingh Gohel and depositing the amount of deposits in cash as directed by this Court, within three days the State Government will release the petitioner on parole for a period of five days with full escort as may be determined by the State by strictly following the conditions as set out hereinabove.

Rule is made absolute accordingly.

Direct Service of this Order is permitted.

Date : 14-8-2001 [H.K.Rathod, J.]

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